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**IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

JOHN CHRISTOPHER TURNER,	)	
	)	Case No. CV01-18-06904
Plaintiff,	)	
	)	
vs.	)	<b>IDAHO TRANSPORTATION</b>
	)	<b>DEPARTMENT'S ANSWER</b>
	)	
IDAHO TRANSPORTATION DEPARTMENT,	)	
an executive department of the state of Idaho,	)	
	)	
Defendant.	)	
	)	

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Defendant Idaho Transportation Department ("ITD"), by and through its counsel of record, Deputy Attorneys General Colleen D. Zahn and Brian V. Church, hereby answers Plaintiff's Complaint and Demand for Jury Trial ("Complaint") filed April 11, 2018.

1. Any allegations of the Complaint not specifically admitted are denied. Any allegations of fact that ITD does not have sufficient knowledge or information to admit or deny

are generally denied. Any statement in this Answer that part of the Complaint is an opinion or conclusion of law and not an allegation of fact is a general denial if that part of the Complaint is an allegation of fact rather than a statement of opinion or a conclusion of law. Failure to dispute a conclusion of law is not agreement with the conclusion of law.

2. ITD reserves its right to amend this and any other answer or denial stated herein, after it has an opportunity to complete discovery regarding the allegations contained in Plaintiff's Complaint.

3. Introductory Paragraph: ITD admits only that Plaintiff was employed by ITD for approximately one year until he was terminated in October 2017 for falsifying testing records and failing to perform required tests of concrete, thus putting the traveling public at risk, and failing to perform his job duties. ITD denies the remaining allegations contained in the introductory paragraph of Plaintiff's Complaint.

4. Nature of Claims Paragraph: This paragraph contains Plaintiff's characterization of his legal claims and remedies he seeks, which does not require a response from ITD. To the extent a response is required to this paragraph, ITD denies Plaintiff states a right to recovery or is entitled to recover any of the damages requested.

5. Paragraph 1: ITD admits only that it is an executive department of the State of Idaho, and its director is appointed by the Idaho Transportation Board. *See* Idaho Code § 40-503. ITD denies the remaining allegations.

6. Paragraph 2: ITD admits only that Plaintiff was employed by ITD from October 24, 2016, until October 13, 2017. ITD is without sufficient information to admit or deny the remaining allegations, and therefore denies the allegations.

7. Paragraph 3: ITD admits only that this Court has subject matter jurisdiction over properly pled claims, and further admits that this Court has personal jurisdiction over ITD.

8. Paragraph 4: ITD does not contest Plaintiff's contention that venue is proper with this Court, but otherwise denies any remaining allegations.

9. Paragraph 5: ITD admits only that the damages sought by Plaintiff satisfy this Court's jurisdictional requirement.

10. Paragraph 6: ITD admits only that it extended an offer of employment to Plaintiff on October 6, 2016, and that Plaintiff was hired by ITD effective October 24, 2016. The remaining allegations are denied.

11. Paragraph 7: ITD admits only that Plaintiff was hired as a Transportation Technician Principle, Engineering, within ITD's Central Laboratory Unit. ITD further admits that within the Central Laboratory is the Structures and Cement Laboratory. ITD further admits that its Central Laboratory is managed by the Central Laboratory Manager, who supervised all Central Laboratory employees including Plaintiff. ITD further admits that Plaintiff was hired as a lead worker. ITD denies the remaining allegations.

12. Paragraph 8: ITD admits only that in 2017, ITD arranged for Plaintiff to attend training approved by the Nuclear Regulatory Commission ("NRC"), so that Plaintiff could assist the Chief Radiation Safety Officer ("RSO") as needed and with the intention that Plaintiff would take over as the Chief RSO when the current one retired. Plaintiff never actually served as an RSO with ITD. ITD further admits that while Plaintiff passed his initial 1040 hour probationary period, Plaintiff's work did not continue to meet the standards of ITD. ITD denies the remaining allegations.

13. Paragraph 9: ITD admits only that in July 2017, a contractor for an ITD project damaged a nuclear density gauge at a project site. ITD further admits that ITD's Chief RSO reported the event to the NRC. ITD further admits that ITD staff expected an audit from the NRC of its nuclear gauge program, following the report of the damage. ITD further admits that in anticipation of the expected NRC audit, ITD initiated an internal review of its nuclear gauges and gauge-related documentation to ensure ITD was in compliance with the applicable rules, regulations, and other requirements. ITD denies the remaining allegations.

14. Paragraph 10: ITD admits that nuclear density gauges are used by ITD, can be portable, and can test and determine conditions, including density and moisture content. ITD further admits that its nuclear density gauges contain byproduct, source, or special nuclear material. ITD denies the remaining allegations.

15. Paragraph 11: ITD admits only that its receipt, acquisition, possession, transfer of a byproduct, source, or special nuclear material; that its use of such material; and that its delivery or transfer of such material is subject to federal law and regulations, including the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974, as well as regulations of the NRC. ITD denies the remaining allegations.

16. Paragraph 12: To the extent Plaintiff offers an opinion or conclusion of law, ITD denies the paragraph. To the extent Plaintiff offers a factual assertion, ITD admits only that the NRC has the responsibilities granted it by federal law. ITD denies the remaining allegations.

17. Paragraph 13: To the extent Plaintiff offers an opinion or conclusion of law, ITD denies the paragraph. To the extent Plaintiff offers a factual assertion, ITD admits only that the NRC has promulgated regulations and conducts inspections and audits. ITD denies the remaining allegations.

18. Paragraph 14: To the extent Plaintiff offers an opinion or conclusion of law, ITD denies the paragraph. To the extent Plaintiff offers a factual assertion, ITD admits only that Idaho does not have an agreement with the NRC to assume certain regulatory authority and is a Non-Agreement State. ITD further incorporates its response to Paragraph 11 (above). ITD denies the remaining allegations.

19. Paragraph 15: ITD admits only the following: on information and belief, after ITD began its review of nuclear gauge-related documentation in July 2017, ITD learned the records maintained by the Chief RSO were not well organized. ITD denies the remaining allegations.

20. Paragraph 16: ITD admits only that on or about July 15, 2017 the Central Laboratory Manager asked Plaintiff to review the Chief RSO's files to get an update on the condition of ITD's records regarding the gauges, to determine how well the records may have been kept, and if ITD had any compliance problems with the NRC regulations and reporting. ITD denies the remaining allegations.

21. Paragraph 17: ITD admits only that while Plaintiff complained that he was unable to locate certain documents, other ITD employees were able to locate the documents. ITD also admits only that Plaintiff requested years of prior inventories and that ITD provided Plaintiff with the prior inventories it still had, but that ITD did not have every prior inventory ever conducted. ITD denies the remaining allegations.

22. Paragraph 18: ITD admits that Plaintiff reported to the Central Laboratory Manager that he was unable to locate documentation or was having trouble finding documentation. ITD further admits that Plaintiff asked the Central Laboratory Manager to allow Plaintiff to travel to all of the ITD districts and conduct an inventory; the Central Laboratory Manager re-directed Plaintiff to instead look at the inventory information that the districts had submitted to ITD

headquarters within the last month. ITD further admits that Plaintiff had prepared an Excel spreadsheet that he had asked the Central Laboratory Manager to send to the districts so that the districts could fill-in certain information within the spreadsheet and return it. ITD further admits that the Central Laboratory Manager sent the Excel spreadsheet out to the districts. ITD denies the remaining allegations.

23. Paragraph 19: ITD denies this paragraph.

24. Paragraph 20: With respect to what Plaintiff determined, suspected, or believed, ITD is without information sufficient to admit or deny these allegations, and therefore denies the allegations. ITD denies that only seven nuclear density gauges were being used throughout the state. ITD admits that its fleet of nuclear density gauges included gauges that were at least 20 years old. ITD further admits that it began purchasing new nuclear density gauges to replace the older gauges. As part of these purchases, ITD would also arrange for the seller to accept one or more of the older gauges that were at the end of their useful life, were in need of extensive repair, were frequently being repaired, and / or for which there trouble sourcing replacement parts. ITD further admits that by coordinating a trade-in of the old units, ITD was able to save the money that would be spent for decommissioning an old unit. ITD further admits it was able to acquire nuclear density gauges with newer technology. ITD denies the remaining allegations.

25. Paragraph 21: ITD admits only that on at least one occasion, Plaintiff asked the Central Laboratory Manager to provide Plaintiff with copies of all prior annual inventories of nuclear density gauges; and that the Central Laboratory manager provided Plaintiff with the prior inventories ITD still had, but that ITD did not have every prior inventory ever conducted. ITD denies the remaining allegations.

26. Paragraph 22: ITD admits only that when questioned by ITD's Chief Engineer that Plaintiff indicated there were not any issues that required a self-reportable violation to the NRC. ITD denies the remaining allegations.

27. Paragraph 23: With respect to Plaintiff's beliefs or concerns, ITD is without information sufficient to admit or deny these allegations, and therefore denies the allegations. ITD admits only that during at least one conversation with a Technical Engineer II, Plaintiff referenced 'dirty bomb'. ITD further admits that ITD was not found by the NRC to have lost any gauges, but was instead found to have 14 gauges of one particular model, when it was authorized by its then current license to have only 10 gauges of that particular model. See Exhibit A to Plaintiff's Complaint. ITD denies the remaining allegations.

28. Paragraph 24: ITD denies the allegations in this paragraph. ITD admits only that during a meeting on August 9, 2017, between Plaintiff, the Chief Engineer, the Central Laboratory Manager, and a human resource specialist, Plaintiff raised the subject of the FBI when he asked a human resource specialist whether the FBI had ever knocked on her door in the middle of the night. ITD denies the remaining allegations.

29. Paragraph 25: ITD denies the folders suddenly appeared. ITD is without sufficient information to admit or deny whether Plaintiff searched the area where the folders were located. ITD denies the remaining allegations.

30. Paragraph 26: ITD admits only that on August 3, 2017, Plaintiff sent an email to the Chief Engineer, Central Laboratory Manager and other ITD managers and employees, demanding a meeting and alleging what Plaintiff called an "active cover-up." The Chief Engineer responded back, informing Plaintiff that this was a serious accusation and that he was out of town but would arrange for Plaintiff to meet with the Engineering Services Administrator. Plaintiff then

wrote back that he was not accusing anyone of anything. Plaintiff met with the Central Laboratory Manager and other ITD employees that same day. Following the meeting the Central Laboratory Manager sent an email to the Chief Engineer in which he stated that he had concluded that there was no ongoing cover-up and information was still in the process of being collected. Plaintiff emailed back and disagreed. Another ITD employee emailed Plaintiff that same day, providing Plaintiff with additional information and questioning the accuracy of some information contained on a spreadsheet Plaintiff had created. Subsequently on Monday, August 7, 2017, the Chief Engineer met with Plaintiff, during which Plaintiff expressed that the Central Laboratory Manager did not know how many gauges there were, that there was a conspiracy, and that the Central Laboratory Manager was trying to mislead him. During this August 7<sup>th</sup> meeting, the Chief Engineer asked Plaintiff whether he had found anything that was a reportable violation of NRC rules, to which Plaintiff responded there was not. Subsequently, on August 9<sup>th</sup>, Plaintiff, the Chief Engineer, the Central Laboratory Manager, and a human resource specialist met. During that August 9<sup>th</sup> meeting, Plaintiff informed the group that he believed he was being set up to be the fall-guy, to which the Chief Engineer informed Plaintiff that he did not need to do the internal review if it was causing him grief, and informed him not to worry about the internal review. This led to Plaintiff apologizing to the group during the August 9<sup>th</sup> meeting, and in an August 10<sup>th</sup> email to the Chief Engineer and Central Laboratory Manager. In his August 10<sup>th</sup> email, Plaintiff remarked, “The possibility of the NRC showing up scared me and spurred the dominance side of my circumplex to a point that was unacceptable.” ITD denies the remaining allegations.

31. Paragraph 27: ITD denies these allegations. ITD admits only that its Central Laboratory Manager and a Technical Engineer II had attempted to help Plaintiff by asking him to clarify what he was looking for. ITD further admits that on one occasion, when a Technical



Engineer II, who had overseen the purchasing of some nuclear density gauges, offered to assist Plaintiff with locating certain records and by pointing out where certain records were, Plaintiff had responded that the inventory was wrong. The Technical Engineer II asked Plaintiff to explain his approach to the internal review, to which Plaintiff simply turned to a coworker and remarked that he was being asked to explain his logic. ITD denies the remaining allegations.

32. Paragraph 28: With respect to Plaintiff's beliefs, motivations, or concerns, ITD is without information sufficient to admit or deny these allegations, and therefore denies the allegations. ITD repeatedly advised Plaintiff that there were no gauges missing, but Plaintiff refused to accept this information and has apparently continued to refuse to accept this information even after the NRC concluded there were no missing gauges. ITD denies the remaining allegations.

33. Paragraph 29: ITD denies that it took steps to try to keep Mr. Turner from talking with the NRC. ITD further admits that it was not until months after Plaintiff's termination that ITD learned that Plaintiff met with the NRC on August 31, 2017. As for the remaining allegations, ITD is without information sufficient to admit or deny these allegations, and therefore denies the allegations.

34. Paragraph 30: ITD admits only that the NRC reviewed three concerns raised by Plaintiff, which were assigned the reference "Allegation RIV-2017-A-0074." ITD has no knowledge concerning when the NRC began investigating those concerns and did not even become aware of the NRC's review until March 2018, when Plaintiff attached a copy of a "Status of Concerns" letter to a tort claim he submitted to the Idaho Secretary of State on March 22, 2018.

35. Paragraph 31: ITD admits only that the NRC reviewed Plaintiff's concerns raised concerning whether ITD's Chief RSO was routinely performing inventories of ITD's nuclear gauges; and concerning whether ITD was performing "audits" of its NRC-licensed radiation

protection program. ITD further admits that with regard to Plaintiff's concern regarding inventories, the NRC determined that the Chief RSO was not regularly conducting inventories, but the local district RSOs were conducting the required inventories. The NRC further determined that there were no nuclear gauges missing, but that the Chief RSO and some members of ITD management were not aware of how many nuclear gauges ITD possessed. ITD further admits that with regard to Plaintiff's concern regarding "audits," which the federal rules describe as annual reviews of radiation program content and implementation, that the NRC determined the Chief RSO had not been performing reviews of the program content and implementation.

36. Paragraph 32: ITD admits only that on September 11, 2017, Plaintiff met with ITD's Chief Engineer and a human resource specialist to discuss several issues that had been brought to their attention. During the meeting they asked Plaintiff about a reported incident on or about August 31, 2017 where Plaintiff grabbed a co-worker's pants with a gator hook and held the gator hook to the co-worker's throat; about a reported knife incident on or about August 31, 2017 where Plaintiff pointed a knife at a coworker; about a heated argument with a co-worker at a contractor's facility on or about September 5, 2017; and about Plaintiff's alleged failure to test concrete samples at the same contractor's facility on or about September 5, 2017. Plaintiff denied touching a co-worker with the gator hook or putting it to the co-worker's throat, denied pointing the knife at a co-worker, denied engaging in a heated argument with a co-worker while at the contractor's facility, and stated it was normal to not conduct the test in question. At the conclusion of the meeting ITD placed Plaintiff on an investigatory suspension with pay so it could further investigate each of the alleged incidents. ITD denies the remaining allegations.

37. Paragraph 33: ITD admits only that its memorandum to Plaintiff on September 11, 2017, advised Plaintiff that he was "required to be available to meet with the investigator or your

supervisor and cooperate with the investigation”, and, “You must immediately turn over all keys and/or access codes to the premises, and equipment such as a lap top computer, phone and/or department issued cell phone and you are not to enter ITD property or contact other ITD employees until further notified.”

38. Paragraph 34: ITD admits that after completing its investigation of the alleged incidents, that on September 29, 2017 ITD District 3 District Engineer Amy Revis issued Plaintiff a Notice of Contemplated Action (“NOCA”) for dismissal of employment.

39. Paragraph 35: ITD admits only that the NOCA cited three bases under Idaho law for the contemplated action:

- Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the agency or the Division of Human Resources and Idaho Personnel Commission;
- Inefficiency, incompetency or negligence in performing duties, or job performance that fails to meet established performance standards; and
- Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department.

The NOCA also alleged Plaintiff violated the ITD Human Resources Policy and Procedure Handbook, which states, among other things:

- Set a positive example of public service and good citizenship by upholding the letter and spirit of laws, rules, and policies;
- Exhibit professional behavior at all times;
- Treat all individuals or groups with dignity and respect. Any action or behavior that demeans, insults, intimidates, undermines, sabotages and/or excludes or isolates other individuals or groups, whether intentional or not, will not be tolerated;
- Employees violating any part of the ITD Administrative Policy 5033 Workplace Violence may be subject to disciplinary action, up to and including dismissal.

ITD further admits the NOCA explained the bases for the contemplated action:

- On August 31, 2017, Plaintiff went out to his car, obtained a large, sharp gator hook used for fishing, threatened a co-worker with it and snagged the co-worker’s pants.

- On September 5, 2017, one of ITD's contractors observed Plaintiff in a heated argument with a co-worker and overheard Plaintiff calling the co-worker "fucking stupid" and an "idiot." The contractor alleged that Plaintiff appeared unwilling to help his co-worker and observed Plaintiff appear to push his co-worker. When questioned about this incident by ITD, Plaintiff stated hiring the co-worker was the biggest mistake Plaintiff made in his life.
- The same ITD contractor also advised ITD that Plaintiff was not properly testing materials while at the contractor's site. The contractor voiced concern that Plaintiff was putting the contractor and the traveling public at risk by not following proper testing protocols. The NOCA then explained the specific testing failures alleged by the contractor.
- As a result of Plaintiff's behavior with his co-worker and failure to properly test materials, the contractor had requested ITD not send Plaintiff back to the contractor's place of business.

The NOCA then advised Plaintiff that he was expected to represent ITD in a positive and professional manner at all times and that Plaintiff's behavior demonstrated a blatant disregard for ITD's policies and procedures, as well as the referenced Idaho Code and administrative rule provisions. The NOCA further advised that Plaintiff's aggressive and threatening conduct, as well as his negligence in performing his job duties would not be tolerated. The NOCA advised Plaintiff he had 7 days to provide either a written or in-person response to ITD, and that ITD would advise Plaintiff of its final decision no later than October 16, 2017. ITD denies the remaining allegations.

40. Paragraph 36: ITD admits that on October 6, 2017 Plaintiff provided a written response to the Notice of Contemplated Action. ITD further admits that while Plaintiff contended his September 11 suspension was a retaliatory action for his work reviewing ITD's nuclear density gauge program, Plaintiff then acknowledged he "did retrieve a large gator hook from [his] car during a conservation" with two ITD employees on August 31, 2017 and showed it to one employee "in a joking manner". Plaintiff denied having a heated exchange with his co-worker and denied calling his co-worker the referenced names, however then went on at length about how the co-worker was the biggest hiring mistake Plaintiff made in his life because the co-worker did not

have the ability to perform his job. Plaintiff also admitted that he “did not run a spread test” blaming the “field conditions inside the facility.” ITD denies the remaining allegations.

41. Paragraph 37: ITD admits that one week after receiving Plaintiff’s written response, on October 13, 2017, and after first attempting to reach Plaintiff by phone, it mailed and emailed to Plaintiff a Letter of Disciplinary Action (“LODA”), which terminated Plaintiff’s employment with ITD. ITD denies the remaining allegations.

42. Paragraph 38: ITD admits that the LODA informed Plaintiff that “Falsifying testing records is putting the contractor and travelling public at risk.” ITD further admits that in the Letter of Disciplinary Action, District Engineer Revis wrote, “After careful review of the information available to me, I have decided there are reasonable grounds to support the disciplinary action of dismissal.” ITD denies the remaining allegations.

43. Paragraph 39: ITD admits only that the LODA advised Plaintiff that although he admitted failing to perform the spread test in his October 6 written response, Plaintiff’s own testing records contained test results, thus creating the impression Plaintiff had run the tests. ITD advised Plaintiff that falsifying testing records put both the contractor and the traveling public at risk. Given Plaintiff’s admission that he did not perform the spread test, the LODA did not address the remaining bases for termination that were identified in the NOCA. ITD denies the remaining allegations.

44. Paragraph 40: ITD admits only that by letter dated November 3, 2017, the NRC provided ITD a “NRC INSPECTION REPORT 030-32230/2017/001 AND NOTICE OF VIOLATION” for NRC Docket Number 030-32230. ITD further admits that the Notice of Violation listed three severity level IV violations of NRC requirements:

- That ITD possessed byproduct material in excess of the maximum amount authorized in its license; namely that ITD possessed 14 Humboldt Scientific Model

5001 nuclear density gauges, when its license only allowed it to possess 10 of the gauges.

- That ITD failed to periodically (on at least an annual basis) review its radiation protection program content and implementation.
- That from at least January 1, 2016 through September 19, 2017, ITD's Coeur d'Alene office failed to maintain a log book for individuals to sign out portable gauges, to include the date(s) the gauge was in use, the name(s) of the authorized users who would be responsible for the gauge, and the temporary job site(s) where the gauge would be used.

ITD further admits that level IV violations are the least severe violations and therefore no escalated enforcement process occurred. Rather, ITD was required to submit an action plan to correct the violations, which it addressed in a written response to the NRC. ITD further admits that by letter dated January 12, 2018, the NRC informed ITD that its proposed actions appeared to adequately address the regulatory non-compliances described in the Notice of Violation.

45. Paragraph 41: ITD denies that the NRC provided ITD with a copy of the Status of Concerns letter presented in Exhibit B to the Complaint, which concerns a different NRC Docket Number from the NRC Inspection Report and Notice of Violation referenced in a Paragraph 40. In fact, ITD was unaware of the NRC's Status of Concerns letter, and the concerns reviewed by the NRC in that letter, until Plaintiff submitted his Notice of Tort Claim to the Idaho Secretary of State in March 2018. ITD is without sufficient information to admit or deny whether the NRC conducted "a very detailed and thorough investigation". ITD admits only that the Status of Concerns letter relates:

- That the NRC reviewed a concern that an RSO was not routinely performing inventories of nuclear density gauges, and that the licensee was not aware of how many nuclear density gauges it had. The NRC inspectors found that the RSOs at the districts officers were conducting physical inventories at least every six months, and had leak test results which corroborated that inventories were being done as required, but that the Chief RSO had not compiled this information for all districts. The NRC inspectors also were able to clear up a misunderstanding involving some ITD staff relating to the number of nuclear density gauges as compared to the number authorized on the license. The inspectors did find that ITD had more of a specific model of gauge than it was authorized by its license, which the NRC had

identified to ITD in the Notice of Violation, but the inspectors were able to confirm that ITD could account for the nuclear density gauges in its possession, “with no unaccounted for portable nuclear gauges.”

- That the NRC reviewed a concern that ITD had not performed reviews of its radiation protection program. These reviews look at the radiation protection program content and implementation. The inspectors had confirmed with the Chief RSO that he had not performed and was not aware of periodic reviews of the radiation protection program, which the NRC had already identified in its November 1, 2017 Notice of Violation.

ITD further admits that Exhibit B to the Complaint is a true copy (except for the redaction) of the document that it first received in March 2018, when Plaintiff included it with his Notice of Tort Claim.

#### **RESPONSE TO FIRST CLAIM FOR RELIEF**

46. Paragraph 42: ITD incorporates by reference all answers, responses and denials contained in the prior paragraphs of this Answer as if fully set forth herein.

47. Paragraph 43: TD admits only that it falls within the definition of “employer” set forth in I.C. §6-2103(4)(a).

48. Paragraph 44-47: ITD denies these paragraphs.

#### **RESPONSE TO SECOND CLAIM FOR RELIEF**

49. Paragraph 48: ITD incorporates by reference all answers, responses and denials contained in the prior paragraphs of this Answer as if fully set forth herein.

50. Paragraphs 49: This paragraph contains Plaintiff’s legal conclusions, to which no response is required by ITD. To the extent a response is required, ITD denies these paragraphs.

51. Paragraphs 50-53: ITD denies these paragraphs.

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## **DEFENSES AND/OR AFFIRMATIVE DEFENSES**

As further answer to the Complaint, ITD asserts the following affirmative defenses. In asserting such defenses, ITD does not concede or admit liability to Plaintiff, nor does the ITD waive any right to assert that Plaintiff bears the burden of proof as to any and all matters.

### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff's Complaint fails to state a claim upon which relief may be granted and should be dismissed pursuant to F.R.C.P. 12(b)(6).

### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff failed to mitigate his damages.

### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff's damages, if any, were caused by the negligence or fault of Plaintiff, for whose negligence or fault ITD is not liable.

### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by sovereign immunity under the Eleventh Amendment.

### **FIFTH AFFIRMATIVE DEFENSE**

Some or all of Plaintiff's claims are barred by the applicable statutes of limitation.

### **SIXTH AFFIRMATIVE DEFENSE**

Some or all of Plaintiff's claims are barred by estoppel, laches, and/or waiver.

### **ATTORNEY FEES**

ITD has been required to retain attorneys in order to defend this action and is entitled to recover its reasonable attorney fees in accordance with state law, including Idaho Code §§ 6-2107, 12-117, and 12-121.

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**PRAYER FOR RELIEF**

WHEREFORE, ITD prays for judgment against Plaintiff as follows:

1. That Plaintiff's Complaint be dismissed with prejudice and that Plaintiff receive no relief whatsoever;
2. For reasonable attorney fees pursuant to state law, and Idaho Code §§ 6-2107, 12-117, and 12-121; and
3. For such other legal and/or equitable relief as provided by law or that is just, reasonable and equitable.

DATED this 19<sup>th</sup> day of November, 2018

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Colleen Zahn  
Colleen Zahn  
Deputy Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that on November 19<sup>th</sup>, 2018, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service:

T. Guy Hallam

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

By: /s/ Colleen Zahn  
Colleen Zahn